In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 93

SENFOUR INVESTMENT CO., INC., APPELLANT

v.

KING COUNTY

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON[1]

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

This memorandum is submitted pursuant to the Court's order of May 16, 1966, inviting the Solicitor General to express the views of the United States in this case.

[1] Although the appellant invokes the jurisdiction of this Court by appeal under 28 U.S.C. 1257(2), it would seem that the appropriate method of review is by petition for a writ of certiorari under 28 U.S.C. 1257(3). "[A]n attack upon a tax assessment or levy * * * on the ground that it infringes a taxpayer's federal rights, privileges, or immunities, will not sustain an appeal * * *" (*Rohr Aircraft Corp.* v. *County of San Diego*, 362 U.S. 628, 629–630, quoting *Charleston Federal Savings & Loan Assn.* v. *Alderson*, 324 U.S. 182, 195). Here appellant's claim is that the Judicial Code and the Bankruptcy Act immunize it from the tax. See text, *infra*. Accordingly, under 28 U.S.C. 2103 the appeal should be dismissed and the appeal papers treated as a petition for certiorari.

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The question presented is whether the sale by a trustee of the property by a debtor in reorganization under Chapter X of the Bankruptcy Act, pursuant to a plan for the sale of its assets, may be subjected to a State sales tax. The appellant corporation, the purchaser of such property, claimed immunity from the tax in reliance upon *California State Board of Equalization* v. *Goggin*, 245 F. 2d 44 (C.A. 9), certiorari denied, 353 U.S. 961. *Goggin* held that the Bankruptcy Act exempted from a California retail sales tax sales made by a trustee in bankruptcy in liquidating a bankrupt estate. In the present case the Supreme Court of Washington distinguished *Goggin* on the ground that there the sale took place in bankruptcy, while here it occurred as part of a reorganization plan under Chapter X; and it upheld the imposition of the Washington sales tax upon the transfer of the debtor's real property.

1. The basis upon which the Supreme Court of Washington distinguished *Goggin* seems unpersuasive. The rationale of *Goggin* was that "a state tax upon a sale of tangible property under an order of the bankruptcy court directing liquidation" is "an unlawful interference with" "the liquidation process" of the bankruptcy court (245 F. 2d at 45, 46). But it is difficult to see why the imposition of a State tax upon the sale of a debtor's property is any less an interference with "the liquidation process" of the bankruptcy court merely because the sale takes place as part of a plan or reorganization under Chapter X rather than in straight bankruptcy.

On the other hand, the fact that the liquidation in

the present case was not of the business itself, but only of a particular corporation that conducted it, would afford a more persuasive basis for distinguishing *Goggin*. Unlike the sale of the bankrupt's assets in *Goggin*, here the business was sold as a going entity, which the purchaser presumably intended to continue to operate. Thus, the sale of the debtor's assets in the present case pursuant to a Chapter X plan of reorganization did not constitute an exercise of the bankruptcy's court's "liquidation process" in the same sense in which such process was used in *Goggin*.

Moreover, the correctness of *Goggin* is doubtful. The imposition of such a State tax would not seem to interfere with the functioning of the bankruptcy court. In addition, *Goggin* rests upon a questionable statutory interpretation. The court relied upon 28 U.S.C. 960, which provides that officers or agents "conducting any business under authority of a United States court shall be subject to all Federal, State and local taxes applicable to such business to the same extent as if it were conducted by an individual or corporation." It reasoned that since Congress in Section 960 subjected to State taxation only a trustee "conducting [a] business," it impliedly immunized from such taxation other acts of the trustee, including liquidation selling (245 F. 2d at 46–48).

But such reasoning is dubious. This Court has been most reluctant to find a congressional intention to grant immunity from State taxation in the absence of clear legislative intent to do so. See *Swarts* v. *Hammer*, 194 U.S. 441, 444; *Graves* v. *New York ex*

rel. O'Keefe, 306 U.S. 466, 480; and *Boteler* v. *Ingels*, 308 U.S. 57, 60–61. See also Wurzel, *Taxation During Bankruptcy Liquidation*, 55 Harv. L. Rev. 1141, 1166–1167; Note, *State Taxation of Bankruptcy Liquidations: Federalism Misconceived*, 67 Yale L. J. 335. Nothing in the legislative history of Section 960 reflects any intention to confer immunity. On the contrary, the statute was enacted in response to a lower court decision that a federal receiver operating a gasoline distribution business was not liable for a State sales tax on motor fuel;[2] its purpose was to preclude the substantial revenue losses to the States that that decision portended. H. Rep. 1138, 73rd Cong., 1st Sess.; S. Rep. 1372, 73rd Cong., 2d Sess.

In sum, the Supreme Court of Washington may have reached the right result, although not for the reasons which it gave.

2. Although the Securities and Exchange Commission is a statutory party in most Chapter X reorganizations involving a substantial number of public securities holders,[3] it has not had any occasion to consider the effect upon the feasibility of plans of re-

[2] *Howe* v. *Atlantic, Pacific & Gulf Oil Co.*, 4 F. Supp. 162 (W.D. Mo.), reversed *sub nom. Kansas City, Mo.* v. *Johnson*, 70 F. 2d 360 (C.A. 8), certiorari denied, 293 U.S. 617.

[3] Bankruptcy Act, Section 208, 11 U.S.C. 608. In addition to thus participating in such proceedings, the Commission is informed of all Chapter X proceedings (Section 265 of the Bankruptcy Act, 11 U.S.C. 665) and has certain other statutory duties in connection with those proceedings. See, *e.g.*, Section 172 of the Bankruptcy Act (11 U.S.C. 572), requiring the district judge in some cases, and authorizing him in others, to submit proposed plans of reorganization to the Commission for an advisory report.

organization of permitting the States to impose sales taxes on transfers thereunder. Thus, the Commission's experience suggests that the decision below does not present a recurrent issue of importance in Chapter X proceedings. Similarly, the experience of the Department of Justice and the Internal Revenue Service does not indicate that the imposition of such State sales taxes has caused any problems in the collection of federal taxes. Accordingly, as far as the interest of the United States is concerned, there is no occasion for review by this Court.

Respectfully submitted.

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